Duquesne Law Review

Volume 38
Number 2 *Symposium on Approaching E-Commerce Through Uniform Legislation: Understanding the Uniform Computer Information Transactions Act and the Uniform Electronic Transactions Act*

Article 9

2000

The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983

David J. DelFiandra

Comments

The Growth of Prison Privatization and the Threat Posed by 42 U.S.C. § 1983

INTRODUCTION

The role of privatization in America is rapidly expanding. Politicians, seeking to cut costs and reduce budget deficits, have found that privatization is an effective tool to achieve their objectives.[1] Privatization is the process of changing, as a business or industry, from public to private control or ownership.[2] The prison industry has been a recent target of privatization.[3] 42 U.S.C. § 1983 ("section 1983") is a civil rights statute that is often a basis for lawsuits filed by prisoners against prison guards.[4] Section 1983 seeks "to deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights."[5] Governmental prison guards are afforded a qualified immunity from suit.[6] In *Richardson v. McKnight*,[7] 521 U.S. 399 (1997), the Supreme

---

1. Phil Smith, *Private Prisons: Profits of Crime*, COVERT ACTION QUARTERLY, Fall 1993, at 2 (visited Feb. 2, 2000) <http://www.mediafilter.org/MFF/Prison.html>.

2. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 936 (9th ed. 1991).

3. RICHARD W. HARDING, PRIVATE PRISONS AND PUBLIC ACCOUNTABILITY 4 (1997).

4. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

42 U.S.C. § 1983 (1994).

5. Wyatt v. Cole, 504 U.S. 158, 161 (1992).

6. Procunier v. Navarette, 434 U.S. 555, 561 (1978).

Court held that the qualified immunity from suit should not be extended to private prison guards.[8]

This comment explores the recent expansion of privatized prisons, and the effect that section 1983 has and will have on this expansion. Part I of this comment discusses the history and future of prison privatization in the United States. Part II of this comment discusses the impact of section 1983 on the future of prison privatization. Part III discusses the impact that *Richardson v. McKnight* has had on the prison privatization movement.[89]

I. The History and Future of the Privatization of Prisons in America

A. *Privatization Generally*

The privatization movement in America has come full circle. In recent years, federal, state, and local governments have been contracting out traditionally governmental roles to America's private sector in large numbers.[10] This movement has been spawned by governmental budget cuts and politicians' beliefs that the private sector is more adept at efficiently handling once distinct public functions.[11] The growing interest in privatization can be traced to the 1980's and the election of President Ronald Reagan.[12] Reagan appealed to angry taxpayers, who saw the government becoming increasingly involved in virtually every aspect of their lives. Reagan's platform vowed to "get government off our backs."[13] During the Reagan administration, partisan politicians vigorously advocated the "superiority of free enterprise."[14] Thus, the modern privatization movement was born.

Privatization involves the removal of certain responsibilities, activities, or assets from governmental control, usually in countries retreating from post-war and post-colonial experiments with socialism, and has included the separation of factories, mines,

---

7. 521 U.S. 399 (1997).
8. *Richardson*, 521 U.S. at 412.
9. *Id.* at 399.
10. Paul Howard Morris, *The Impact of Constitutional Liability on the Privatization Movement After Richardson v. McKnight*, 525 Vand. L. Rev. 489, 491 (1999).
11. *Id.*
12. Charles H. Logan, Private Prisons: Cons and Pros 3 (1990).
13. *Id.*
14. Smith, *supra* note 1, at 2.

airlines, and railroads from public control.[15] Such situations typically involve governmental retention of collective financing, and the delegation of delivery and management to the private sector.[16] Although privatization in the United States may appear to be a fairly recent phenomenon, the movement toward privatization can be traced far back in our history.[17]

Privatizing traditional governmental functions can result in many benefits for the American economy as a whole. The first obvious benefit is that the private sector can typically perform the governmental function more efficiently.[18] A private sector firm can spread overhead among its other private enterprises, thereby reducing the unit cost of service for an individual enterprise.[19] The private sector can perform the same function as the government more efficiently because it operates under competition with a motive for profits.[20] A profit-motivated manager will devote extra time to operate the enterprise in the most efficient manner, resulting in a reduction of operational costs.[21] A private sector firm is well aware that a competitor will quickly take its place if it does not utilize every resource to become efficient, without sacrificing quality.[21] The government lacks this incentive because it faces none of the concerns of a private enterprise regarding profits or competition.[23]

By the 1980's, many Americans saw the wide range of potential

---

15. J. DONAHUE, THE PRIVATIZATION DECISION: PUBLIC ENDS, PRIVATE MEANS 215 (1989).

16. *Id.* In the case of prison privatization, collective financing is a process of financing whereby the state continues to fund the costs of imprisonment, but the private sector is paid to manage this imprisonment. HARDING, *supra* note 3, at 4. Some examples include the private sector also supplying the prison building. *Id.* When the private enterprise manages the prison at a cost lower than the state funds provided, the private enterprise realizes a profit. *Id.*

17. Morris, *supra* note 10, at 490 (explaining that Christopher Columbus was a private contractor for the Spanish Monarch). *See also* discussion *infra* Part II.

18. GARY W. BOWMAN, ET AL, PRIVATIZING THE UNITED STATES JUSTICE SYSTEM, POLICE, ADJUDICATION, AND CORRECTIONS SERVICES FROM THE PRIVATE SECTOR 290 (1992).

19. *Id.*

20. Morris, *supra* note 10, at 491.

21. BOWMAN, *supra* note 18, at 290.

22. *Id.*

23. MARTIN P. SELLERS, THE HISTORY AND POLITICS OF PRIVATE PRISONS 14 (1993). Thomas Jefferson once stated:

> Having always observed that public works are always much less advantageously managed than the same are by private hands, I have thought it better for the public to go to the market for whatever it wants which is found there, for there competition brings it down to the minimum value.

Id. (citing LYNTON K. CALDWELL, THE ADMINISTRATIVE THEORIES OF HAMILTON AND JEFFERSON (1944)).

benefits that could result from the privatization of even the most traditional governmental roles. President Reagan established the President's Commission on Privatization to "identify those government programs that are not properly the responsibility of the federal government or that can be performed more efficiently by the private sector."[24] Among other things, the Commission recommended privatization for low-income governmental housing, air traffic control, education, the United States Postal Service, prisons, and Medicare.[25] State governments have followed the example set by the federal government; for instance, in 1991 the State of Ohio retreated from the business of selling liquor to the public by privatizing "state" liquor stores.[26] The sale of state controlled liquor stores not only helped to decentralize state government, but it also increased profitability without increasing liquor consumption.[27]

The 1980's also saw the United States exploring an unlikely candidate to join the privatization movement - state and federal prisons. The movement escalated as three trends converged: the ideological imperatives of the free market, the dramatic increase in the number of prisoners, and the increase in imprisonment costs.[28] A collection of business entrepreneurs, free market advocates, public officials facing budget deficits, and academics promised design and management innovations without sacrificing prison quality.[29] By the end of 1996, there were over 100 operational private state and federal prisons in America.[30]

B. History of Prison Privatization

Although the rapid movement toward the privatization of prisons began in the 1980's, the notion of private firms operating prisons in

---

24. Morris, *supra* note 10, at 492. *See* DAVID F. LINOWES ET AL., PRIVATIZATION: TOWARD MORE EFFECTIVE GOVERNMENT: REPORT OF THE PRESIDENT'S COMMISSION ON PRIVATIZATION xi (1988).

25. *Id.* at 492-93.

26. Steve Stephens, *Last Call for Ohio's Remaining Government-Run Liquor Stores*, COLUMBUS DISPATCH, November 10, 1996, at 1A.

27. James Bradshaw, *Privatizing Liquor Sales a Win, Voinovich Says; Union Disagrees*, COLUMBUS DISPATCH, July 22, 1998, at 6B. Sales of liquor fell from 9.08 million gallons in 1991, the year Ohio began privatizing liquor stores, to 8.11 million gallons for the fiscal year ending June 30, 1998. *Id.* For fiscal year 1998, profitability increased by $21.5 million over fiscal year 1997. *Id.*

28. Smith, *supra* note 1, at 2.

29. *Id.*

30. HARDING, *supra* note 3, at 4.

America was not novel. State legislatures in the mid-1800's, intent on cutting expenditures, awarded contracts to private entrepreneurs to operate and manage Louisiana's first state prison, as well as New York's Auburn and Sing Sing prisons.[31] This early privatization movement was limited, however, to the extent that the states would lease convict labor to private companies, although in some states fully operational private prisons were sanctioned.[32] Most of the prisoners in these early private prisons suffered from malnourishment, frequent whippings, overwork, and overcrowding.[33] As a result, state governments succumbed to public pressure and began to regulate the private prisons.[34] By the early 1900's, opposition from labor, business, and reformers forced states to take full responsibility for private prisons, effectively ending the first era of private prisons.[35]

Just as public pressure caused the demise of private prisons in the early 1900's, public pressure brought a resurgence of the concept in the 1980's. Frustrated taxpayers, angry at how large and bureaucratic government had become, began to advocate that the private sector could perform many governmental functions more efficiently and at less cost than the government. One such function was the operation of state and federal prisons. New companies such as the Corrections Corporation of America ("CCA"); Wakenhut; Pricor; U.S. Corrections; Concepts, Inc.; and Correction Management Affiliates were founded to capitalize on the growing business opportunity of housing America's criminals.[36]

CCA has emerged as the pioneer and industry leader in private prisons, by capitalizing on the business and political expertise of its co-founders, Doctor R. Crants and Tom Beasley.[37] By 1992, CCA

---

31. Smith, *supra* note 1, at 2. These prisons were state operated, maximum security facilities. *Id.*

32. *Id.* Texas is an example of one state that sanctioned fully operational private prisons. *Id.*

33. *Id.*

34. *Id.* Opposition from labor, business, and reformers forced the state to shoulder the burden of responsibility for prisons in America. *Id.*

35. *Id.*

36. Smith, *supra* note 1, at 2.

37. *Id.* at 4. Doctor R. Crants was a Nashville banker and financier, and Tom Beasley is the former Tennessee Republican chair. *Id.* Both used their business and political ties to win early governmental contracts. *Id.* Early contracts included Immigration and Naturalization Service ("INS") detention centers in Houston and Laredo, Texas, and the Silverdale Workhouse in Tennessee. *Id.* Doctor Crants currently serves as chairman and chief executive officer of CCA. Corrections Corporation of America, *Company Officers* (visited Feb. 14, 2000) <http://www.correctionscorp.com/info.html>.

operated twenty-one detention facilities that held over 6,000 prisoners in six states, England, and Australia.[38] As the crime rate increased in the United States, so did the responsibility of housing criminals. By the end of 1998, there were 1,302,019 prisoners under federal and state jurisdictions with federal prisons operating at 27% above capacity and state prisons between 13% and 22% above capacity.[39] The rate of increase for local, state, and federal institutions is approximately 10% per year.[40] CCA's 1994 annual report to shareholders stated that "[t]here are powerful market forces driving our industry, and its potential has barely been touched."[41]

C. Pros and Cons of Prison Privatization

The prison privatization movement has been accompanied by a balance of eccentric supporters and harsh critics, each portraying plausible arguments for their cause.

1. Pros of Prison Privatization

The two most common arguments for prison privatization is that it will promote greater efficiency and improve quality in the construction and management of prisons.[42] Efficiency in the construction of prison facilities encompasses both gains in the speed with which facilities can be built or renovated, as well as cost savings.[43] The private sector often has the resources to finance major construction projects that local, state, and federal governments are either unable or unwilling to finance due to budget constraints.[44] The concept of management efficiency includes the idea that private entrepreneurs will strive to keep costs down through the optimal utilization of staff, reduced capital investments, and lowest-price purchasing of subsidiary prison goods and services.[45] These are areas where public management

38. Smith, *supra* note 1, at 2.

39. United States Department of Justice, *Bureau of Justice Statistics, Prison Statistics*, (1999) (visited Jan. 25, 2000) <http://www.ojp.usdoj.gov/bjs/prisons.html>.

40. BOWMAN, *supra* note 18, at 7.

41. HARDING, *supra* note 3, at 4.

42. BOWMAN, *supra* note 18, at 256.

43. *Id.* These are both critical advantages because the sooner the facilities are built and become operational, the quicker the state will realize the cost savings that accompany privatization. *Id.*

44. *Id.* The public sector is limited due to budget constraints, and any increased financing would likely be passed on to unsympathetic taxpayers. *Id.*

45. *Id.* Private sector management would seek to operate efficiently using the least

has traditionally been inefficient.[46] Improved construction quality allows the private sector greater flexibility in choosing sites, personnel, and material; it also allows the private sector to take advantage of the latest building technology, resulting in an improved capacity to respond to the specific needs of a very diverse prison population.[47]

2. Cons of Prison Privatization

Many opponents to the privatization movement concede that privatization would result in greater efficiency; however, they believe that overall prison quality would suffer due to the fact that profit remains the ultimate goal in the private sector.[48] Opponents of prison privatization also argue that the process of incarcerating criminals is an inherently governmental function that cannot be ethically delegated to the private sector.[49] The officially recorded policy of the American Civil Liberties Union ("ACLU") states:

> The delegation of control and custody of prisoners to private entities, in and of itself, raises serious constitutional concerns. Because the deprivation of physical freedom is one of the most severe interferences with liberty that the State can impose, and because of civil liberties concern created by private management . . . the power to deprive another of his/her freedom cannot be delegated to private entities.[50]

Many commentators also believe that privatization results in a transfer of wealth from governmental employees who receive good

---

expensive means. *Id.* Public management has been largely ineffective in this area due to lack of accountability. *Id.*

46. *Id.* This may result from the fact that, under affirmative-action policies, the government must award a certain number of its contracts to local or minority-operated companies. *Id.*

47. BOWMAN, *supra* note 18, at 256. A better facility design will result in improved prisoner oversight and control capabilities. *Id.* This will result in manpower savings because it will now be possible for one prison guard to perform the duties that previously required several guards. *Id.*

48. *Id.* at 257. These opponents believe that even a minute decrease in quality, when compared with the public prison system, would be unacceptable. *Id.*

49. Morris, *supra* note 10, at 495. Morris contends that opponents of privatization assert that the government should not delegate the responsibility and power of regulating the life of a citizen deprived of his freedom. *Id.*

50. LOGAN, *supra* note 12, at 49. The ACLU regards imprisonment as among the "functions which rightfully belong to the government." *Id.* Sandy Rabinowitz, Director of the Houston office of the ACLU has declared that "the whole concept [of private prisons] is really frightening." *Id.*

pay, benefits, job security, and good working conditions as a result of working in government facilities, to a corporation, where profit motives cause the bottom line to be critical, and subsequent advantages to employees less plentiful.[51]

There have also been security problems associated with private prisons. One well reported example is the Northeast Ohio Correctional Center, a CCA-operated prison that opened in Youngstown in 1997.[52] The prison initially opened as a medium-security prison, but CCA soon began transferring maximum security prisoners from prisons located in the Washington, D.C. area to the Youngstown prison.[53] During the first ten months the prison was open, twenty prisoners were stabbed, two fatally, at the hands of other prisoners.[54] Both state and city officials were aware of the problems surrounding the Youngstown prison, yet they had no way to monitor or control the problem because the Northeast Ohio Correctional Center is a private enterprise, which enjoys all the privacy rights that accompany private entities.[55]

On July 25, 1998, the situation became critical as six men, four of them convicted killers, escaped from the Youngstown prison.[56] All six had been transferred from Washington, D.C. prisons.[57] The escape occurred two days after CCA told a federal judge that it had transferred all "dangerous" inmates from Youngstown to other prisons.[58] CCA had requested that United States District Judge Sam Bell lift a ban that prohibited the transfer of inmates to the

---

51. Morris, *supra* note 10, at 495. Critics assert that governmental functions are better performed by governmental agencies that are not distracted by profit motivation. *Id.*

52. *See CBS News: 60 Minutes, Private Prisons Break Rules to Make a Profit,* (CBS television broadcast, May 2, 1999); *see also States Grapple with Private Prison Problems,* NEW YORK TIMES NEWS SERVICE, April 15, 1999.

53. *Private Prison Can't Be Closed, State Says,* AKRON BEACON JOURNAL, August 4, 1998. Many of the inmates were transferred to Youngstown because of a lawsuit against a Washington, D.C. area prison alleging the prison was a nuisance due to frequent escapes by prisoners. *Id.*

54. *States Grapple with Private Prison Problems,* NEW YORK TIMES NEWS SERVICE, April 15, 1999.

55. *Id.* Government officials are not involved in the daily operations of private prisons to the same extent as they are for prisons run by the public. *Id.* Private prisons are not subject to the same governmental oversight and monitoring. *Id.*

56. Randall Edwards, *4 Killers Escape, On Loose Private Prison,* COLUMBUS DISPATCH, July 26, 1998, at A1. Some inmates may have caused a distraction that caused officers to leave their assigned position in the recreation yard. *Id.*

57. *Id.* The six escapees included four prisoners convicted of murder, one convicted of assault with a deadly weapon, and one serving time for armed robbery. *Id.*

58. *Id.*

Youngstown prison.[59] The escape prompted Ohio State Senator Bob Hagan to say, "I don't think one escape proves that I was right, but I think that two murders, close to twenty stabbings and now six escapes provides a good indication that private prisons are not the way to go in Ohio."[60] Ohio's governor, George V. Voinovich, called on United States Attorney General Janet Reno and other federal officials to find a way to immediately close the Youngstown private prison.[61] To support this request, Voinovich cited to the fact that the United States Department of Justice has jurisdiction over the District of Columbia prison system, where the Youngstown escapees originated from.[62]

Public officials were bewildered when they discovered that it took the privately operated facility at least one-half hour to detect the escape, and that prison officials only learned of the escape because another prisoner had informed them.[63] All six escapees were eventually caught.[64] A report on the Youngstown prison, ordered by Attorney General Janet Reno, recommended that the prisoner population be cut, recreational activities for prisoners be increased, and more experienced supervisors be hired to oversee prison operations.[65] As is well justified, the Youngstown prison debacle has given those opposed to prison privatization solid ground to argue from.

---

59. *Id.* CCA told United States District Judge Bell that the corporation had transferred the most dangerous inmates elsewhere and that it should be allowed to accept more prisoners from the District of Columbia. *Id.*

60. *Id.* State Senator Bob Hagan is a Democrat from Youngstown. *Id.* Hagan lives in near proximity to the prison and had vigorously opposed the prison. *Id.*

61. Catherine Candisky and Alan Johnson, *Governor Asks Reno to Help Close Prison*, COLUMBUS DISPATCH, July 30, 1998, at C1.

62. *Id.* Voinovich requested that Reno investigate the prison's contract and standards, stating that he and residents near the prison were frightened and outraged. *Id.*

63. Rita Price, *2 Escapees Still Sought - Anger Erupts In Youngstown Over Private Prison*, COLUMBUS DISPATCH, July 27, 1998, at A1. Sergeant William Frease, of the Mahoning County (Ohio) Sheriff's Office, said, "There were probably ninety guys who could have gone out. They just chose not to." *Id.*

64. Mark Tatge, *Youngstown Prison Should be Cut in Size, Report Says*, CLEVELAND PLAIN DEALER, December 5, 1998, at A1.

65. *Id.* The report was prepared by Corrections Trustee John L. Clark at the request of Attorney General Janet Reno. *Id.*

II. Impact of Section 1983 on the Future of Prison Privatization

A. *Why Prison Guards are Susceptible to Liability Under Section 1983*

A prison guard is a private party performing a traditional government function. However, this private party is subject to many of the same legal standards as their government counterparts.[66] Under section 1983, anytime a private party performs a state governmental function, constitutional implications could result.[67] Section 1983 is a civil rights statute that protects the rights of everyone - including those of prisoners.[68] Section 1983 creates a cause of action when any person, acting under the authority of state law, deprives another person of a right guaranteed by either a federal statute or the Constitution.[69] It seeks to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights."[70] It imposes liability only where a person acts "under color" of a state "statute, ordinance, regulation, custom, or usage."[71] Courts have interpreted section 1983 to impose liability upon a private individual when their actions are "fairly attributable to the state."[72]

---

66. *See* 42 U.S.C. § 1983) (1994). A private prison guard is subject to section 1983 because the civil rights statute applies when a private party performs a government function. *Id.*

67. Section 1983 provides in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .

Id.

68. *Id.* Section 1983 protects "any citizen of the United States or other person within the jurisdiction." *Id.*

69. 42 U.S.C. § 1983 (1994).

70. Richardson v. McKnight, 521 U.S. 399, 403 (1997) (citing Wyatt v. Cole, 504 U.S. 158 (1992)).

71. 42 U.S.C. § 1983 (1994). A private party acts "under color of state law" within the meaning of section 1983 if the party's actions are "fairly attributable to the State." *See* Wyatt v. Cole, 504 U.S. 158, 162 (1992); Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982). This requirement is satisfied if two conditions are met. First, the "deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for whom the State is responsible." *Wyatt*, 504 U.S. at 162. Second, the private party must have "acted together with or . . . obtained significant aid from state officials" or engaged in conduct "otherwise chargeable to the State." *Wyatt*, 504 U.S. at 162.

72. *See Wyatt*, 504 U.S. at 162; *Lugar*, 457 U.S. at 924.

Section 1983 was originally adopted as part of the Civil Rights Act of 1871, as an attempt to curb violence perpetrated by the Ku Klux Klan against African-Americans in southern states.[73] Southern state courts and governments had historically not protected African-Americans from the violence of the Klan, and section 1983 was enacted as a measure that would enable the federal judiciary to respond to these violations of individual liberty.[74] However, section 1983 originally had little impact on the southern states' practice of not affording protection to African-Americans.[75] For the first ninety years after its passage, the Supreme Court interpreted the section narrowly, and consistently held that section 1983 only applied to actions committed by state officials pursuant to official state policy.[76] Therefore, if a person employed by the state was not acting in an "official" capacity, pursuant to "official state policy," a citizen was unable to utilize section 1983 to achieve redress.[77]

In the *Civil Rights Cases*,[78] the Court held that section 1983 was not a remedy for the wrongful acts of individuals who acted contrary to state policy.[79] The *Civil Rights Cases* were an amalgamation of cases brought by the United States against

---

73. *See* Wilson v. Garcia, 471 U.S. 261, 276 (1985). The Court found that the passage of the Act was a direct result of "the campaign of violence and deception in the South, fomented by the Ku Klux Klan, which was denying decent citizens their civil and political rights." *Id. See also* Monroe v. Pape, 365 U.S. 167, 185 (1961) (discussing the passage of the Act which became the Ku Klux Klan Act: "This section of the bill, on the same state of facts, not only provides a civil remedy for persons whose former condition may have been that of slaves, but also to all people where, under color of State law, they or any of them may be deprived of rights.")

74. Morris, *supra* note 10, at 498; Gene R. Nichol, *Federalism, State Courts and § 1983*, 73 VA. L. REV. 959, 974-75 (1987).

75. Morris, *supra* note 10, at 498. For the first fifty years after its passage, only twenty-one cases were decided under the statute. *Id.*

76. *Id.* There was a long-standing assumption that section 1983 reached only misconduct either officially authorized or so widely tolerated as to amount to custom or usage. *See* PETER W. LOW AND JOHN C. JEFFRIES, JR., FEDERAL COURTS AND THE LAW OF FEDERAL-STATE RELATIONS 970 (3d ed. 1994).

77. Morris, *supra* note 10, at 498. This narrow interpretation of section 1983 was because the purpose of the legislation was to protect citizens from state indifference to Ku Klux Klan violence. *Id.*

78. 109 U.S. 3, 17 (1883).

79. *The Civil Rights Cases*, 109 U.S. at 17. Justice Bradley explained,

> The wrongful act of an individual, unsupported by any such authority is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property, or his reputation; but if not sanctioned in some way by the state, or not done under state authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the state for redress.

Id.

individuals, for alleged violations of the Civil Rights Act of 1875.[80] The allegations against the individuals included denying to persons of color the accommodations and privileges of an inn or hotel; denying to individuals of color the privileges and accommodations of a theater; and the refusal of a conductor of a railroad company to allow a woman of color to ride in the "ladies" car.[81] The Court stated that unless a state policy expressly sanctioned the individual's wrongful conduct, the plaintiff's redress was limited to an action against the individual through state law.[82] Thus, it appeared that section 1983 applied only to state policies and not to actions performed by state officials.

Until the 1960's, the United States Supreme Court held steadfast to this narrow interpretation of section 1983. However, in 1961 the Court decided *Monroe v. Pape*,[83] which greatly expanded the Court's interpretation of section 1983.[84] In *Monroe*, the Court held that, even though the Illinois Constitution and other state laws outlawed unreasonable searches and seizures, a suit brought by Illinois residents against police who allegedly made illegal searches and seizures could be maintained under section 1983, before any relief was afforded under a state statute.[85] Prior to this ruling, an

---

80. *Id.* at 4. The Civil Rights Act of 1875 was entitled "An Act to Protect all Citizens in Their Civil and Legal Rights." *Id.*

81. *The Civil Rights Cases*, 190 U.S. at 4-5. The individuals were alleged to have denied a "colored person" a seat in the dress circle of Maguire's theater in San Francisco; denying another person, whose "color" is not stated, the full enjoyment of the accommodations of the theater known as the Grand Opera House in New York; and the refusal of a conductor of the Memphis & Charleston Railroad Company to allow a woman of African descent to ride in the "ladies" car. *Id.*

82. *Id.* at 17.

83. 365 U.S. 167 (1961).

84. Morris, *supra* note 10, at 498. In *Monroe*, it was alleged that 13 Chicago police officers broke into the home of the petitioners, routed them from bed, and made them stand naked in the living room while the officers ransacked the home. *Monroe v. Pape*, 365 U.S. 167, 169 (1961). Monroe was then taken to the police station, interrogated for 10 hours about a two-day old murder, was not taken before a magistrate, was not permitted to place a phone call, and was subsequently released with no criminal charges being filed. *Id.* The complaint alleged that the police had no search warrant and that they acted "under color of the statutes, ordinances, regulations, customs and usages" of Illinois and the City of Chicago. *Id.*

85. *Monroe*, 365 U.S. at 183. The Court noted that the federal remedy was supplementary to the state remedy and that the state remedy did not need to be sought and refused before the federal remedy could be invoked. *Id.* The Court looked to *United States v. Classic* to determine when a state official is acting "under the color of state law." *Id.* (citing United States v. Classic, 313 U.S. 299, 325-26 (1941)). The *Classic* Court held that "[m]isuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law, is action taken under color of state law." *Classic*, 313 U.S. at 326.

individual could not successfully litigate a section 1983 claim unless the state law or policy at issue explicitly condoned the state official's behavior. *Monroe* allowed individuals to base their section 1983 claims on the fact that a state official's conduct violated their civil rights, and did not have to prove that a state law or policy violated their civil rights.[86] The *Monroe* decision cleared the way for the use of section 1983 as a multi-purpose cause of action against state officials who violate a federally created right, even if in doing so the state official is acting against state policy.[87] Thus, the *Monroe* Court determined that section 1983 applied to state officials acting under the color of state law, even though they were acting contrary to state law and policy.[88]

It was not until 1970, however, that the Supreme Court ruled that a section 1983 action could be maintained against a private party who was not connected in any way to a state government. In *Adickes v. S.H. Kress & Co.*,[89] the Court held that a private party defendant's actions warranted treatment as governmental actions subject to the prohibitions of the Fourteenth Amendment to the Constitution.[90] *Adickes* involved an action by a white, female plaintiff who had been denied service in the defendant's restaurant because she was in the company of African-Americans.[91] The plaintiff brought a section 1983 claim against the restaurant owner to recover damages for an alleged violation of her constitutional rights under the Equal Protection Clause of the Fourteenth Amendment.[92] The plaintiff alleged that the defendant refused to serve her because of a state-enforced custom of segregating the races in public restaurants.[93] The *Adickes* Court, in reversing the United States Court of Appeals for the Second Circuit, held that a

---

86. *Monroe*, 365 U.S. at 183.

87. Morris, *supra* note 10, at 499. Prior to *Monroe*, section 1983 was interpreted narrowly and only provided relief if state officers' actions were sanctioned by the state. *Id.* The statute is now a multi-purpose statute because it now protects against violations of federal law by state officials even when acting contrary to state law. *Id.*

88. *Monroe*, 365 U.S. at 183-84.

89. 398 U.S. 144 (1970).

90. *Adickes*, 398 U.S. at 169-71. The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws." U.S CONST. amend. XIV.

91. *Adickes*, 398 U.S. at 146.

92. *Id.* The alleged violation occurred at a restaurant in Mississippi. *Id.* However, the action was brought in the United States District Court for the Southern District of New York, alleging a violation of the Fourteenth Amendment's Equal Protection Clause, which provides that "No State . . . shall deny to any person within its jurisdiction the equal protection of the laws." U.S CONST. amend. XIV.

93. *Adickes*, 398 U.S. at 147.

section 1983 claim can be brought against a private party if a plaintiff can show: (1) the existence of a state-enforced custom of segregating the races in public eating places; and (2) that the defendant's refusal to serve the plaintiff was motivated by that state-enforced custom.[94] The Court explained that in order to meet the first nexus of the test in *Adickes*, a jury would have to find that a police officer was present in the restaurant while the plaintiff was refused service, and that the police officer communicated his disapproval of service to the restaurant employees.[95]

Adickes required a degree of conspiratorial intent between the private party and a government official before a section 1983 claim could be successfully litigated.[96] In *Lugar v. Edmundson Oil Co.*,[97] the Supreme Court ruled that lack of conspiratorial intent is not necessarily a bar to a section 1983 claim.[98] Edmundson brought suit in Virginia state court for a debt owed by Lugar.[99] The clerk of the state court issued a writ of attachment that was executed by the county sheriff.[100] Lugar then brought a section 1983 action, claiming

---

94. *Id.* at 173-74. The Court noted in a footnote that

> [a]ny notion that a *private* person is necessarily immune from liability under section 1983 because of the "*under color of*" requirement of the statute was put to test by our holding in *United States v. Price*, [383 U.S. 787 (1966)]. There, in the context of a conspiracy, the Court said: "To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State."

Id. at 174 n. 44.

95. *Adickes*, 398 U.S. at 158. Thus, the presence of a police officer communicating disapproval would amount to a state-enforced custom of segregation in eating establishments. *Id.* In *Adickes*, the defendant failed to demonstrate that no police officer was present in the store when the alleged discrimination took place. *Id.* The jury could infer from the circumstances that the police officer and a restaurant employee had a "meeting of the minds" and determined that the plaintiff should not be served. *Id.* A private party involved in such a conspiracy can be liable under section 1983. *Id.* at 152.

> Private persons jointly engaged with state officials in the prohibited action, are acting 'under color' of law for the purposes of the statute. To act 'under color' of law does not require that the accused be an officer of the State. It is enough that he is a willful participant in joint activity with the State or its agents.

United States v. Price, 383 U.S. 787, 794 (1966).

96. *Adickes*, 398 U.S. at 152.

97. 457 U.S. 922 (1982).

98. *Lugar*, 457 U.S. at 941-42. The *Lugar* Court expanded the holding in *Adickes* by no longer requiring a conspiratorial intent between the accused and the state. *Id. Lugar* explained that the accused can be liable if their actions can be fairly attributable to the state and that invoking the aid of state officials to take advantage of a state created attachment procedure was fairly attributable to the state. *Id.*

99. *Lugar*, 457 U.S. at 924. Edmundson was a supplier of Lugar's, and the debt was owed on these supplies. *Id.*

100. *Id.* The trial judge later dismissed the attachment, citing Edmundson's failure to establish the alleged statutory grounds for attachment. *Id.* at 925.

that through the attachment of his property, Edmundson had acted jointly with the State of Virginia to deprive him of his property without due process of law.[101] The *Lugar* Court held that if the conduct by Edmundson amounted to state action for purposes of the Due Process Clause of the Fourteenth Amendment, then the conduct was also action under color of state law, and would support a suit under section 1983.[102] In an opinion by Justice Byron White, the Court rationalized as follows:

> [I]f a debtor in state-court debt collection proceedings can successfully challenge, on federal due process grounds, the plaintiff creditor's resort to the procedures authorized by a state statute, it is difficult to understand why that same behavior by the state court plaintiff should not provide a cause of action under section 1983.[103]

This effectively put an end to the requirement that a private individual must first conspire with a government official before a section 1983 claim can successfully be maintained. After *Lugar*, if an individual's due process is violated in accordance with state statutory procedures, that individual will be allowed a federal cause of action under section 1983.[104]

B. Defenses Available to a Section 1983 Suit

Once a section 1983 claim has been brought, a defendant may be able to successfully assert qualified immunity as to the statute. Section 1983 does not explicitly mention the defense of qualified immunity in the text of the statute.[105] The immunity has been

---

101. *Id.* at 925. Lugar brought the action against both Edmundson Oil Company and its president, Ronald L. Barbour. *Id.*

102. *Id.* at 935. Lugar sought compensatory and punitive damages for specified financial loss allegedly caused by the attachment. *Id.* at 925.

103. *Id.* at 934. The Court looked to its other decisions involving garnishment procedures and due process for support in its holding. *See* Snidach v. Family Finance Corp., 395 U.S. 337 (1969); North Georgia Finishing, Inc. v. Di-Chem, Inc., 419 U.S. 601 (1975); and Mitchell v. W.T. Grant Co., 416 U.S. 600 (1974). *Id.* at 937.

104. *Lugar*, 457 U.S. at 934. The Court reiterated that the Act was passed for the purpose of enforcing the rights guaranteed under the Fourteenth Amendment. *Id.*

105. Section 1983 provides in full as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in a any action brought

afforded by the courts through common law and has been gradually expanded over time.

The first case in which the Supreme Court recognized and extended qualified immunity to a government official was *Pierson v. Ray*.[106] In *Pierson*, fifteen white and African American Episcopal clergymen, who attempted to use segregated facilities at an interstate bus terminal, were arrested by Jackson, Mississippi police officers and charged with violating a Mississippi statute.[107] The Mississippi statute made it illegal for anyone to congregate with others in a public place under such circumstances that a breach of the peace may occur.[108] The clergymen brought a section 1983 action against the police officers for making an unconstitutional and false arrest.[109] The Supreme Court held that the defenses of good faith and probable cause were available to the officers in a section 1983 action.[110] The Court reasoned that section 1983 liability "should be read against the background of tort

---

against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983 (1994).

106. 386 U.S. 547 (1967).

107. *Pierson*, 386 U.S. at 549. The clergymen were charged with violating section 2087.5 of the Mississippi Code, which provided in part:

(1) Whoever with intent to provoke a breach of the peace, or under circumstances such that a breach of the peace may be occasioned thereby: (a) Crowds or congregates with others in . . . any hotel, motel, store, restaurant, lunch counter, cafeteria, sandwich shop, . . . or any other place of business engaged in selling or serving members of the public, or in or around any free entrance to any such place of business or public building, or to any building owned by another individual . . . and who fails or refuses to disperse or move on, when ordered to do so by any law enforcement officer of the State of Mississippi, or any other authorized person, . . . shall be guilty of disorderly conduct . . . .

MISS. CODE § 2087.5 (1942) (current version at MISS. CODE ANN. § 97-35-3 (1999)).

108. *Pierson*, 386 U.S. at 549. The petitioners waived a jury trial and were convicted of the offense by a municipal police justice. *Id.* at 550. One petitioner appealed to the county court and the court granted his motion for a directed verdict. *Id.* The cases against the other petitioners were dropped. *Id.*

109. *Id.* at 550. The suit was brought for damages in the United States District Court for the Southern District of Mississippi. *Id.*

110. *Id.* at 557. The police officers did not attempt to defend on the theory that they believed in good faith that it was constitutional to arrest the ministers solely for using the waiting room. *Id.* The officers claimed that they did not arrest the ministers for the purpose of preserving the custom of segregation in Mississippi, but solely for the purpose of preventing violence. *Id.* The Court also noted that the defense of good faith and probable cause was available to police officers under the common law action for false arrest and imprisonment. *Id.*

liability that makes a man responsible for the natural consequences of his actions," and part of this background includes the defenses of good faith and probable cause for police officers making an arrest.[111] Under *Pierson*, the officers could escape liability under section 1983 if they could prove that they reasonably believed in good faith that the arrests were constitutional, even though the arrests were in fact unconstitutional.[112]

The Supreme Court has since clarified the qualified immunity defense through its decision in *Wood v. Strickland*.[113] In *Wood*, the Court explained that a defendant charged with a section 1983 claim would escape liability through a qualified immunity defense only if he could show that he subjectively believed he was acting constitutionally, and that this belief was objectively reasonable.[114]

Three years later in *Procunier v. Navarette*,[115] the Supreme Court held for the first time that a public prison guard was entitled to the qualified immunity defense.[116] In *Procunier*, a state prisoner brought a section 1983 action against prison officials alleging a negligent interference with the prisoner's outgoing mail in violation of his constitutional rights.[117] The Supreme Court, following the precedent set in *Wood*, held that the prison officials were entitled to qualified immunity when faced with section 1983 liability.[118] The Court went on to say that the only way the prison officials would be found liable under the *Wood* test would be if there was a clearly established constitutional right, the prison officials knew or should have known of the constitutional right, and the prison officials knew or should have known that their actions violated that right.[119]

---

111. *Id.* at 556.

112. *Id.*

113. 420 U.S. 308 (1975). *Wood* involved a suit by Arkansas public high school students who were expelled from school for violating a school regulation prohibiting the use or possession of intoxicating beverages at school or school activities. *Id.* at 308. The students claimed that their federal constitutional rights to due process were infringed under color of state law by their expulsion from school. *Id.* at 308.

114. *Wood*, 420 U.S. at 321-22. The Court held that a school board member is not immune from liability for damages under section 1983 if he knew or reasonably should have known that the action he took would violate the constitutional rights of the student affected. *Id.* at 322.

115. 434 U.S. 555 (1978).

116. *Procunier*, 434 U.S. at 561. The Court noted that the prison officials and officers were not absolutely immune from liability. *Id.*

117. *Id.* at 557. The prisoner claimed a violation of his First, Fifth, and Fourteenth Amendment rights. *Id.*

118. *Id.* at 561.

119. *Id.* at 562. The Court explained that at the time of the alleged infringement, there was no clearly established First Amendment right of protecting the mailing privileges of state

In *Harlow v. Fitzgerald*,[120] the Supreme Court strengthened the qualified immunity defense.[121] *Harlow* eliminated the subjective aspect of the *Wood* test by holding that a defendant could avoid liability if his actions did not violate a clearly established constitutional right that a reasonable person would have known to be a clearly established constitutional right.[122] Thus, because of the *Harlow* decision, it is much easier for a governmental defendant to assert a qualified immunity defense and have it be successfully applied.

The qualified immunity that the Supreme Court has extended to governmental officials has not been granted to private individuals. In *Wyatt v. Cole*,[123] a case factually similar to *Lugar v. Edmondson Oil Co.*, the Court held that private defendants charged with section 1983 liability for invoking state replevin, garnishment, and attachment statutes, which were later declared unconstitutional, were not entitled to qualified immunity.[124] Wyatt and Cole were involved in a cattle partnership that Cole sought to dissolve.[125] After Cole and Wyatt were unable to reach an agreement concerning dissolution, Cole and his attorney filed a complaint in replevin, as was authorized by Mississippi law.[126]

Wyatt brought a section 1983 action, and a United States district

---

prisoners. *Id.* at 562-63.

120. 457 U.S. 800 (1982).

121. *Harlow*, 457 U.S. at 800. Harlow did not involve a section 1983 claim. *Id.* In *Harlow*, the plaintiff brought suit for damages based on his allegedly unlawful discharge from employment in the Air Force. *Id.* The defendants were senior White House aides to former President Richard M. Nixon and claimed immunity from suit because the case involved actions that they carried out as part of their official duties. *Id.* at 806.

122. *Id.* at 818. The *Harlow* Court held that government officials performing discretionary functions are generally shielded from liability for civil damages as long as their conduct does not violate clearly established statutory or constitutional rights that a reasonable person would have known about. *Id.*

123. 504 U.S. 158 (1992).

124. *Wyatt*, 504 U.S. at 168-69. The Court stressed that qualified immunity acts to safeguard government, not to benefit its agents. *Id.* at 168. The Court recognized that private citizens may unsuspectingly rely on state laws they did not create and may have no reason to believe are invalid, but that this reason alone cannot support an expansion of qualified immunity. *Id.*

125. *Id.* at 159.

126. *Id.* at 160. Mississippi law provided that an individual could obtain a court order for seizure of property possessed by another by posting a bond and swearing to a state court that the applicant was entitled to that property and that the adverse possessor "wrongfully took and detained or wrongfully detained" the property. 1975 Miss. Gen. Laws, ch. 508 §1, (current version at MISS. CODE ANN. § 11-37-101 (1999)). A complaint in replevin is "an action whereby the owner or person entitled to repossession of goods or chattels may recover those goods or chattels from one who has wrongfully distrained or taken or who wrongfully detains such goods or chattels." BLACK'S LAW DICTIONARY 1299 (6th ed. 1990).

court declared the Mississippi statute unconstitutional, holding that the statute failed to afford judges the discretion to deny writs of replevin, thereby violating Wyatt's due process rights.[127] The Supreme Court granted certiorari to determine whether Cole and his attorney, as private individuals, were entitled to qualified immunity so as to escape liability under section 1983.[128] The *Wyatt* Court stressed that it had "recognized qualified immunity for government officials where it was necessary to preserve their ability to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service."[129] The Court also noted that qualified immunity strikes a balance between compensating those who have been injured by official conduct, and protecting governments' ability to perform its traditional functions.[130] The Court could not justify an expansion of the qualified immunity rationale so as to allow its application to private parties.[131] The Court held that the "nexus between private parties and the historic purposes of qualified immunity is simply too attenuated to justify such an extension of our doctrine of [qualified] immunity."[132]

The *Wyatt* Court left open the possibility of a "good faith" defense, stating that it "did not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."[133]

This possible "good faith" defense may one day be used to defeat many of the section 1983 actions filed against private prison guards; however, to date the Supreme Court has not recognized a "good faith" defense for such private prison guards.

---

127. Wyatt v. Cole, 710 F. Supp. 180 (S.D. Miss. 1989).

128. *Wyatt*, 504 U.S. at 161.

129. *Id.* at 167 (citing *Wood*, 420 U.S. 308, 319 (1975)).

130. *Id.* (citing Harlow v. Fitzgerald, 457 U.S. 800, 819 (1982); Pierson v. Ray, 386 U.S. 547, 554 (1967); Anderson v. Creighton, 483 U.S. 635, 638 (1987)).

131. *Wyatt*, 504 U.S. at 168. The Court provided that qualified immunity acts to "safeguard government, and thereby to protect the public at large, not to benefit its agents." *Id.*

132. *Id.* at 168. The Court stressed that private parties hold no office requiring them to exercise discretion. *Id.*

133. *Id.* at 169. These issues were not addressed because they were not fairly before the Court. *Id.*

III. *RICHARDSON V. MCKNIGHT*

Until 1997, there was much debate as to whether qualified immunity would apply in the context of private prisons, because a private prison guard serves almost exactly the same function as a governmental prison guard.[134] The Supreme Court resolved this debate in *Richardson v. McKnight*, holding that prison guards employed by a private firm are not entitled to qualified immunity from section 1983 suits brought by prisoners.[135] McKnight, a prisoner at a privatized Tennessee correctional center, filed an action under section 1983 for physical injuries allegedly inflicted by the prison guards.[136] The Court looked at four aspects of *Wyatt v. Cole*, which controlled their decision to deny immunity to the prison guards.[137] First, a section 1983 action can sometimes impose liability on private individuals.[138] Second, a distinction exists between an immunity from suit and other legal defenses.[139] Third, one must look to the history and purpose of section 1983 immunity to determine whether private individuals enjoy protection from liability.[140] Fourth, *Wyatt* is applicable to the narrow facts upon which it was decided, and should *not* be applied to all cases that concern private individuals.[141]

---

134. *Id.* at 168-69. The *Wyatt* holding of not extending qualified immunity to private parties was limited to the situation in which a private defendant was faced with section 1983 liability for invoking a state replevin, garnishment, or attachment statute. *Id. See* Morris, *supra* note 10, at 518, and Peter J. Duitsman, *The Private Prison Experiment: A Private Sector Solution to Prison Overcrowding*, 76 N.C. L. REV. 2209, 2254 (1998), both arguing that private prison guards are entitled to a qualified immunity or good-faith defense. *Id.*

135. 521 U.S. 399 (1997). The private prison guards argued that they performed the same duties as state prison guards and therefore, should be offered the same immunity as their government counterparts. *Id.* at 408. The United States District Court for the Middle District of Tennessee denied the prison guards' motion to dismiss, and the United States Court of Appeals for the Sixth Circuit affirmed. *Id.* at 402.

136. *Richardson*, 521 U.S. at 401. The two prison guards sued were Daryll Richardson and John Walker. *Id.* They asserted a qualified immunity from section 1983 lawsuits. *Id.* at 401-02.

137. *Id.* at 402 (citing Wyatt v. Cole, 504 U.S. 158 (1992)).

138. *Id.* at 403. The *Wyatt* Court noted that section 1983 seeks to "deter state actors from using the badge of their authority to deprive individuals of their federally guaranteed rights" and to provide related relief, but that section 1983 can sometimes impose liability on a private individual. *Wyatt*, 504 U.S. at 161-62.

139. *Id.* The Court distinguished an immunity from suit, which frees a defendant from liability whether or not he acted wrongly, from other legal defenses, which involve looking to the essence of the wrong. *Id.* This distinction is important because an immunity frees one from liability even if they acted wrongly. *Wyatt*, 504 U.S. at 171-72 (Kennedy, J., concurring).

140. *Richardson*, 521 U.S. at 403-04. The Court has afforded immunity where it has found there was a "tradition of immunity firmly rooted in the common law." *Id.* at 403.

141. *Id.* at 404. The Court noted that *Wyatt* did not provide an answer to the legal

The *Richardson* Court, in reviewing the justification for a qualified immunity defense, stressed that history does not reveal a "firmly rooted tradition" of immunity applicable to private prison guards.[142] The prison guards argued that, because they perform the same duties as governmental prison guards, they should be afforded the same immunity.[143] The Court determined that to decide the issue on a "functional approach" would be to misinterpret the meaning of section 1983.[144] The majority opinion, written by Justice Stephen Breyer, looked to the fact that the most important factor in extending qualified immunity to governmental prison guards - unwarranted timidity - is not present in the private prison setting.[145] Competitive market pressures, the Court insisted, insure effective job performance because those guards who are too timid or aggressive will be replaced, due to the rising costs faced by their employers as a result of lawsuits.[146] Private prisons that do not perform an effective job will be replaced by competitors who not only effectively perform their duties, but also perform them at a lower cost.

The *Richardson* Court reasoned that "marketplace pressures provide the private firm with strong incentives to avoid overly

---

question of whether private prison guards enjoy a qualified immunity from suit under section 1983, but *Wyatt* did direct the Court to look to both the history and purposes that underlie government employee immunity. *Id.* The *Wyatt* Court decided against extending qualified immunity to private individuals; however, the *Richardson* Court acknowledged that *Wyatt* does not control every factual scenario when qualified immunity is in question. *Id.*

142. *Id.* at 407-08. These justifications include the "'necessity to preserve' the ability of government officials 'to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service'" and "principled and fearless decision-making." *Id.* at 408. The Court noted that in the 19th century, private enterprises handled some of the prison management activities and that there is no evidence of extending an immunity toward defendants who performed these functions. *Id.* at 404.

143. *Id.* at 408.

144. *Richardson*, 521 U.S. at 408. Using the "functional approach" would force the Court to afford qualified immunity to the private prison guards because they perform the same functional duties as their public prison guard counterparts to whom qualified immunity is extended. *Id.* at 409. The Court noted that, in many areas, private industry performs the same functions as government. *Id.* The Court provided examples including electricity production, waste disposal and mail delivery. *Id.*

145. *Id.* at 409. The Court looked to earlier precedent, which described the immunity as protecting against unwarranted timidity by public officials as "encouraging the vigorous exercise of official authority," Butz v. Economou, 438 U.S. 478, 506 (1978); by contributing to "principled and fearless decision making," *Wood*, 420 U.S. at 319 (quoting *Pierson*, 386 U.S. at 554); and by responding to the concern that a threat of liability would "'dampen the ardour of all but the most resolute, or the most irresponsible' public officials," *Harlow*, 457 U.S. at 814. *Id.* at 408.

146. *Id.* at 409. The Court noted that these market pressures were present in this case. *Id.*

timid, insufficiently vigorous, unduly fearful, or non-arduous employee job performance."[147] These competitive market pressures are not present in the public prison setting.[148] Governmental employees are responsible to elected officials and the voting public as a whole.[149] The prison guard's individual performance is rarely considered, and civil service rules limit the ability of governmental prison guards to be rewarded or punished.[150]

Additionally, private prisons often obtain insurance to protect potential employees from damages suits, effectively eliminating situations where qualified guard applicants would be discouraged from applying due to fear of potential lawsuits.[151] Governmental prison guard "insurance" comes in the form of a qualified immunity from liability under section 1983.[152] The Court also noted that privatization excuses private prisons from adhering to many civil service law restraints such as a uniform, graduated pay scale for different levels of employee experience.[153] A private firm, unlike a public prison, has the ability to offset any increased risks with higher pay or benefits.[154]

The *Richardson* Court also dismissed the argument that qualified immunity should be afforded to private prison guards because lawsuits against them would distract employees from their duties.[154] The Court, looking to precedent in qualified immunity cases, insisted that distraction alone cannot supply sufficient grounds for immunity.[156] Thus, the Court concluded that there are no special

147. *Id.* at 410.

148. *Id.* The Court noted that the private prison guards in question worked for a large, multi-state private prison firm, that the firm was organized to operate at a profit, and that at the end of its three year contract, the state reviews the firm's performance and the state can choose to award the contract to a competing firm. *Id.* at 409-10.

149. *Richardson*, 521 U.S. at 410.

150. *Id.* at 410-11. The Court explains that this is the reason why they find no special immunity-related need to encourage vigorous performance by private prison guards. *Id.*

151. *Id.* at 411. The Court explained that private prisons are required to maintain comprehensive insurance coverage. *Id.*

152. *Id.* State prisons will still attract talented guards because the guards will know they have immunity from suit, and the fear of potential lawsuits will not weigh in their decision to accept or reject employment. *Id.*

153. *Id.* In Tennessee, civil service laws do not apply to employees of a private prison contractor. TENN. CODE ANN. § 41-24-111 (1997).

154. *Richardson*, 521 U.S. at 411. The Court found it difficult to find a special need for the immunity because the guards' employer does not need to operate like a typical government department. *Id.*

155. *Id.*

156. *Id. See Harlow*, 457 U.S. at 816. The Court noted it was significant that Tennessee law reserved some decisions within the private prison scope for state officials. *Richardson*, 521 U.S. at 412. These decisions included those involving prison discipline and parole. *Id.*

reasons that would favor an extension of the immunity doctrine to the private prison setting.[157]

Justice Antonin Scalia wrote a dissenting opinion in *Richardson*, which was joined by Chief Justice Rehnquist and Justices Kennedy and Thomas.[158] Justice Scalia argued that the majority opinion was unsupported by the common law or public policy and that the majority failed to use the Court's settled practice of determining section 1983 liability using a functional approach.[159] Using a functional approach would force the Court to recognize the qualified immunity defense to section 1983 liability because private prison guards perform the same function as their governmental counterparts.[160] Justice Scalia noted that private individuals have regularly been granted immunity when they perform a governmental function.[161] The dissenters then dispelled the majority's view that there are policy reasons to deny qualified immunity to private prison guards because they believe that history governs the matter.[162] Justice Scalia concluded by questioning the majority's ability to distinguish between the private and public prison guard and by noting that the effect of the majority's decision will be to "artificially raise the cost of privatizing prisons."[163]

---

157. *Richardson*, 521 U.S. at 412.

158. *Id.* at 414 (Scalia, J., dissenting).

159. *Id.* at 416 (Scalia, J., dissenting). The functional approach examines the "nature of the functions with which a particular class of officials has been lawfully entrusted, and . . . the effect that exposure to particular forms of liability would likely have on the appropriate exercise of those functions." *Id.* (citing Forrester v. White, 484 U.S. 219, 224 (1988)).

160. *Id.* at 416 (Scalia, J., dissenting). Justice Scalia pointed out that the parties conceded that the private prison guards on trial performed a "prototypical" governmental function because their duties were to enforce the "state imposed deprivation of liberty." *Id.*

161. *Id.* at 417 (Scalia, J., dissenting). Justice Scalia provided an example of a grand juror who is accorded absolute immunity from suit much in the same way that prosecutors and judges are awarded immunity, noting that like prosecutors and judges they must "exercise a discretionary judgement on the basis of evidence presented to them." *Id.* (citing Imbler v. Pachtman, 424 U.S. 409 (1976)). Justice Scalia also points out that witnesses who testify in court proceedings are granted immunity. *Richardson*, 521 U.S. at 417-18 (Scalia, J., dissenting).

162. *Richardson*, 521 U.S. at 418 (Scalia, J., dissenting). Justice Scalia responded to the majority's opinion that unwarranted timidity is less likely a concern with a private prison guard because of competitive market pressures by explaining that there are not competitive market pressures when politicians award the private prison contracts; thus making it a governmental decision and not a market choice. *Id.* at 419.

163. *Id.* at 422 (Scalia, J., dissenting). The rise in prison costs will either make the privatization of prisons too expensive or cause the state to divert funds to support the increased costs. *Id.* at 422.

CONCLUSION

The decision in *Richardson* has, at least temporarily, resolved the issue of qualified immunity and its application to private prison guards. However, with the increasing popularity of private prisons, related issues are sure to be addressed in the future. As the *Richardson* Court noted, its decision involved only the issue of *immunity* under section 1983, not liability.[164] With the number of prisoners increasing in the United States, the overall costs associated with maintaining prisons has skyrocketed.[165] Both state and federal budgets have had to account for this increase.[166] These huge costs have consequently increased the popularity of private prisons.[167] With the number of private prisons increasing, the number of section 1983 claims against private prison guards will also increase. In the near future, the Court may be forced to address factual situations different than the one faced in *Richardson;* for example, a prison that is operated under a mixture of private and public control. Future opinions will need to decide whether a "good faith" defense will be afforded to private prison guards who are denied the defense of qualified immunity. The *Wyatt* Court left open the possibility of a "good faith" defense, stating that it "did not foreclose the possibility that private defendants faced with § 1983 liability . . . could be entitled to an affirmative defense based on good faith and/or probable cause or that § 1983 suits against private, rather than governmental, parties could require plaintiffs to carry additional burdens."[168] Neither the *Richardson* nor *Wyatt* opinions discussed what a good faith defense would entail, but Justice Anthony Kennedy's concurring opinion in *Wyatt* does offer some guidance.[169] Justice Anthony Kennedy suggested that a good faith defense will be valid if the

---

164. *Id.* at 413. The Court also noted that the result may have been different if it were dealing with facts in which a private individual was briefly associated with a governmental body and serving as an adjunct to government in an essential government activity, or acting under close official supervision. *Id.* Thus, the five to four decision in *Richardson* was narrow in scope. *Id.* at 413-14.

165. Smith, *supra* note 1, at 2. Smith stresses that in 1990, 421 Americans out of 100,000 were in prisons and jails and that by 1992, the number had risen to 455. *Id.*

166. *Id.* at 3. For instance, in California, the state budget for corrections increased seven-fold in the 1980's to $2.1 billion dollars a year. *Id.* Even with the increase, the California prison system was still operating at eighty percent over its capacity. *Id.*

167. *Id.*

168. *Wyatt*, 504 U.S. at 169. These issues were not addressed *in Wyatt* because they were not fairly before the Court. *Id.*

169. *Wyatt*, 504 U.S. at 169 (Kennedy, J., concurring).

defendant can show that he subjectively believed his acts to be constitutional and that his belief is objectively reasonable.[170]

Private prisons are a product of the downsizing efforts by government, an effort that will likely continue into the twenty-first century. Governments praise private prisons for their cost saving operations, and realize that they are needed to house the escalating prison population. The *Richardson* Court's reliance on competitive market forces as a justification for not expanding a qualified immunity to private prison guards is not persuasive. Competition may, in the short run, serve to alleviate a private prison guard's timidity or aggressiveness, but the long-term effect of not offering immunity to private prison guards will be extinction of the private prison system. Private firms will no longer be willing to run the liability risk that is guaranteed to accompany the operation of a prison. Insurance will only go so far. Premiums will become too costly to justify operating a private prison.

The *Richardson* decision may all but effectively end the system that has saved billions of dollars for the state and federal governments. One answer may be the implementation of a quasi-private prison. A quasi-private prison would be a prison that combines aspects from both a government-run prison system and a privately operated prison system.

Although this type of prison will not likely offer the amount of savings associated with a truly private prison, it will be able to implement certain private, cost-saving techniques, while still being able to afford its prison guards with a qualified immunity protection from lawsuits. After *Richardson*, the only way a quasi-private prison will be able to achieve this result is to employ federal prison guards. These quasi-private prison guards would be subject to the same salary levels that federal prison guards are afforded.

This proposal would place the quasi-prison guards within the civil service rules system that the *Richardson* Court cited as one of the reasons that governmental prison guards are afforded a qualified immunity.[171] The Court stated that because governmental prison guards operate in a system composed of civil service rules that have an effect on the way they perform their duties, then they should be afforded a qualified immunity to ensure that the

170. *Id.* at 175 (Kennedy, J., concurring). Kennedy suggested that it should be open to the defendant to show good faith even if a reasonable person in the defendants' position would have acted in a different way. *Id.*

171. *Richardson*, 521 U.S. at 410-11.

governmental prison guard performs his duties effectively without being overly concerned with the threat of lawsuits.[172] Quasi-private prison guards would not be indemnified by the private enterprise's insurance carrier, yet they need not be fearful of potential lawsuits under section 1983 because they will know that they have a qualified immunity defense to any potential lawsuits.

Competitive market pressures, another factor the *Richardson* Court cites as a reason not to extend qualified immunity to private prison guards, would also not apply in the quasi-private setting, because the quasi-guard will be functioning strictly as a federal employee, and will not be able to laterally move to a prison functioning on a wholly private basis.[173]

The *Richardson* Court's analysis of the functional approach to determining whether a private prison guard is entitled to a qualified immunity defense sidesteps the issue by offering the explanation that there are many identical areas in which government and private industry participate.[174] While this is quite true, most of these areas do not involve frivolous lawsuits by prisoners with ample time on their hands, which serve to saturate the legal system and result in a loss of valuable time and money. Prison guards are sued quite regularly.[175] This is due to both the nature of the environment and the duties that the job entails. Governmental prison guards are afforded qualified immunity to guard against an unnecessary waste of *government* time and *government* money. Governmental prison guards and private prison guards perform the same exact duties. There is no justifiable reason why one should be afforded qualified immunity over the other.

David J. DelFiandra

---

172. *Id.* at 410-11.

173. *Id.* at 409. The Court stated, "Competitive pressures mean not only that a firm whose guards are too aggressive will face damages that raise costs, thereby threatening its replacement, but also that a firm whose guards are too timid will face threats of replacement by other firms with records that demonstrate their ability to do a safer and a more effective job." *Id.*

174. *Id.*

175. Tom Zoellner, *Prisoners Get Nowhere with Most Lawsuits*, SALT LAKE TRIBUNE, November 7, 1997. By 1996, there were 68,235 lawsuits filed by the incarcerated U.S. population. *Id.*